JUDICIARY OF
ENGLAND AND WALES

Court of Protection: 2009 Report

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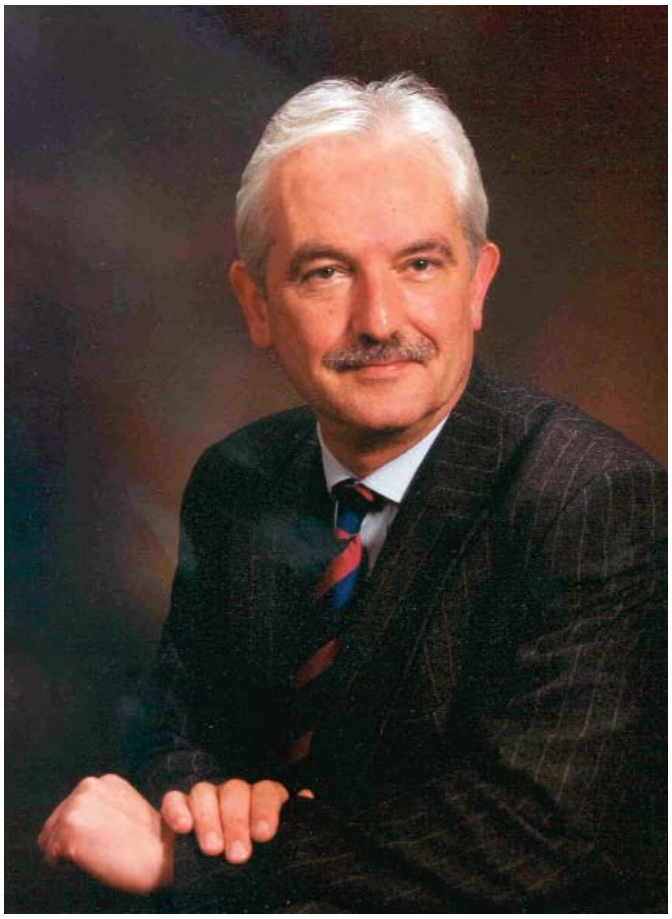
Foreword

By Denzil Lush, Senior Judge of the Court of Protection

This report covers a period of twenty-seven months, from 1 October 2007, when the Mental Capacity Act 2005 came into force, until 31 December 2009, and I cannot pretend that it has been plain sailing. The court has had to endure more than its fair share of setbacks, which were caused in the main by a failure to anticipate, prior to the implementation of the Act, the volume of work that would inundate the court during the initial transitional period, and the overall burden it would place on the judges and staff.



Senior Judge Denzil Lush

In addition, there have been insufficient judges in the court's central registry at Archway Tower to be able to cope with this demand. Throughout the period covered by this report there were only four full-time judges, when the need was for six. The position was exacerbated by the long-term sickness of one of the District Judges, which reduced the active complement to three. This inevitably resulted in delays in dealing with applications. I am pleased to report that three new District Judges have been appointed to Archway, and will take up their posts in April 2010, so as to produce a full complement of London based judiciary.

The Act itself provides that court rules may make provision for the exercise of the jurisdiction of the court by its officers or other staff in such circumstances as the rules may specify. But it was decided that the Court of Protection Rules 2007 should include only a very limited provision to this effect. A change to enable more orders to be made by officers of the court rather than judges is under consideration.

Since 1 April 2009 the court has been part of the Royal Courts of Justice Group within Her Majesty's Courts Service, and has been able to make wider use of courtrooms up and down the country, and benefitted from a much clearer line of demarcation between the court and the Office of the Public Guardian.

Service users have complained that the court's procedures have become more bureaucratic and time-consuming than they used to be. I agree. It is anticipated that the review of the court's rules, forms and practice directions, which the President announced in December 2009, will result in improvements in each of these respects.

One of the aims of the Mental Capacity Act 2005 was to create a unified jurisdiction, combining that of the old Court of Protection in relation to property and financial affairs with the personal welfare jurisdiction exercised by the High Court judges of the Family Division. There remain however significant differences of practice between property and affairs cases and welfare cases.

There have been criticisms in the press that the Court of Protection is a secret court, because, as a general rule, its hearings are held in private (Court of Protection Rules 2007, rule 90). This reflects the long-recognised principle that in cases dealing with the private affairs of persons lacking mental capacity, the parties are entitled to expect

and are best served by privacy, subject to the court's power on application or of its own motion to admit individuals (including members of the press) in appropriate cases.

On a more positive note, the Association of Public Authority Deputies have commented that the court's orders are fit for purpose and are making a significant contribution to the safeguarding vulnerable adults.
After some initial difficulties, the court's regional protocol for attended hearings taking place outside London is working satisfactorily and over 60% of oral hearings in the Court of Protection now take place elsewhere. The regional District Judges have also been very helpful in coming to Archway, sometimes a day or two at a time, though often for a full week, to help process the volume of applications and avoid lengthy delays due to insufficient judicial resources in London.

Part 5 of this report summarises the Court of Protection case law under the Mental Capacity Act. It was more than twelve months after the implementation of the Act, that the first case was reported, but since then there has been a flurry of decisions, and a body of jurisprudence is developing particularly around the concept of best interests decision-making.

It was also four months before the hearing of the first case involving a lasting power of attorney (LPA). LPA cases only come to the court if there are concerns about their validity, or in the event of a dispute. There have been very few LPA objections in the last two years, compared with objections to the registration of the former enduring powers of attorney.

In conclusion, I must thank all the judges, the administration team, and the court staff for the effort and dedication they have put in towards trying to provide a service to as high a standard as possible, against the odds, over the last two years.

Denzil Lush
Senior Judge, Court of Protection

Introduction

This report covers the work of the Court of Protection from the establishment of the court when the Mental Capacity Act 2005 came into force on 1 October 2007 to the end of its second full year of operation on 31 December 2009.

The Court of Protection is the specialist court created under the Mental Capacity Act to make specific decisions or appoint other people known as deputies to make decisions on behalf of people who lack capacity. The new Court of Protection replaced the office of the Supreme Court with the same name, which exercised judicial functions under the Mental Health Act 1983 and the Enduring Powers of Attorney Act 1985, in respect of the property and financial affairs of persons incapable, by reason of mental disorder, of managing and administering their own property and affairs.

The Court of Protection has faced a challenging first two years. The number of applications far exceeded the predicted volumes, particularly in the first nine months where transitional arrangements allowed many applicants to apply to court without paying a fee and there has been insufficient judicial resource to keep pace with demand. In order to assist the position, the President of the Court of Protection authorised the use of ticketed judges from the regions to cover the shortfalls, which in turn impacted on county courts, which have their own problems with growing workloads. The recent appointment of three additional judges to this Court will improve the position for the future.

The court was also affected by the policy decision to place it administratively within the Office of the Public Guardian (OPG) with the court using various "shared services provided by the OPG. These arrangements were confusing to court users who saw the new court and the OPG as reincarnations of the former Public Guardianship Office, rather than the distinct and separate decision-making and regulatory bodies intended by the Mental Capacity Act.

Some court users found the new court rules and procedures difficult to get used to and staff had to embrace a complete change of culture. The court rules are based on relevant Civil Procedure Rules and Family Procedure Rules plus practice directions, which impose a more litigious approach even where proceedings are not contested. Over 40% of court applications are by applicants who have no professional support and less than 6% of cases are contentious. Users complain that not only is the decision-making process difficult to understand, but the forms are too long and much of the information is repeated several times.

In April 2009, the Court of Protection transferred from the OPG to Her Majesty's Courts Service (HMCS) joining the Royal Courts of Justice Group. This has shown immediate benefits with court management being able to tap into the wealth of experience in the RCJ leadership team. The court has begun to remodel its processes through 'continuous improvement' applying Lean principles[1]. In the last year there has also been a drop in the number of complaints.

The year closed with widespread media coverage about the services of the court and the OPG. While some of this coverage related to important concerns about the work of both organisations, the operation of the Mental Capacity Act, and what can be done to look after a person's affairs if they lose capacity, much of the coverage was inaccurate, highlighting in particular widespread confusion over the roles of the court, the OPG and the Court Funds Office.

At the end of 2009, the President announced that he was setting up a committee to undertake a review of the Court of Protection Rules 2007 and the practice directions and forms which accompany the Rules. The committee is expected to report its recommendations in the summer of 2010, with new rules and procedures to follow.

The increased flexibility in the use of judicial resource and court rooms; the work on the rules; the transfer of responsibility for the remaining shared functions provided by the OPG; and the continuing Lean engagement will continue the process of transforming the practices and procedures of the court.

1. Lean is a business improvement tool used by many public and private sector organisations. It aims to remove duplicated and wasteful processes and design new ones with the needs of the customer in mind.

1. Judiciary

The Mental Capacity Act provides that the jurisdiction of the Court of Protection will be exercised by various Judges nominated for that purpose by the Lord Chancellor. The Judges who may be nominated are the President of the Family Division, the Chancellor of the High Court, any judge of the High Court, circuit judges and district judges.

The Lord Chancellor appointed Sir Mark Potter (President of the Family Division and Head of Family Justice) and Sir Andrew Morritt (the Chancellor of the High Court) as President, and Vice President of the Court of Protection respectively. Denzil Lush, formerly Master of the Court of Protection was appointed Senior Judge.

The President nominated three district judges to work full time at the central registry in Archway and a number of circuit and district judges to hear cases part time at various regional courts in England and Wales. A list of nominated judges is at Appendix B. In addition the President has nominated all High Court Judges in the Family and Chancery Divisions to hear appeals and deal with the more complex cases.

The Senior Judge is responsible for overseeing and directing the work of the court, at the central registry. Initially the complement of full time judges was set at four, plus a part time judge to assist with the transitional work of converting former receivers to deputies. District Judge Stephen E Rogers and District Judge Susan Jackson were seconded for two year terms as full time Judges in Archway shortly before October 2007 along with District Judge Marc Marin working part time. In late October 2007, District Judge Keeley Bishop joined as the third full time judge.

It soon became clear that as the court workloads exceeded expectation there was insufficient full time judicial resource and there have been heavy pressures on judges working at the Court of Protection. Unfortunately, the Mental Capacity Act does not provide for deputy judges. So, to assist with the shortage, the President arranged for nominated judges from the regions to work for short spells at Archway to assist in processing the work.

In May 2008, it was agreed to extend the complement of full time judges to six during 2009/10 and the first of these, District Judge Alex Ralton joined in April 2009. But with District Judges Jackson and Bishop leaving at the end of their secondment, it still left the court short of judges and reliant on assistance from regional courts. Nonetheless, three new judges have been selected from the recent district judge competition and will take up their posts in the spring of 2010.

2. Court Administration

The Court of Protection Administration is responsible for processing all aspects of applications made to the Court of Protection. It works closely with the judiciary in Archway and the judiciary and HMCS throughout England and Wales to provide a local and accessible service for court users.

When the court was established in October 2007, the administration was provided by the OPG. The thinking behind this structure was that court users and the OPG's clients would often require the services of both organisations and that there would be advantages to both customer and organisation if certain elements of the service were delivered in a "joined up" way, rather than separately.

The "shared services" provided by the OPG included a single customer service enquiry point known as the Contact Centre with the capacity and capability for handling general enquiries and requests for information about either the OPG or the court, and for filtering such enquiries; plus other non-customer facing activities such as post-handling, fee collection and record keeping.

To maintain a clear distinction between the court's judicial role, and the OPG's supervisory one, the line management of court staff working directly with the judiciary and on processing court applications was kept distinct and separate from that of the staff supporting the Public Guardian's functions.

In October 2008 the HMCS Board agreed that the Court of Protection should transfer to HMCS and in April 2009 the court administration - minus the shared services provided by the OPG - transferred to the Royal Courts of Justice Group. The move has given the court greater flexibility, particularly for sharing judges and court rooms and has helped make the distinction between the court and the OPG clearer to customers.

3. The Work of the Court

Jurisdiction

The Court of Protection is a superior court of record with the same rights, privileges and authority as the High Court. The court has jurisdiction over the property; financial affairs; and personal welfare of those who lack mental capacity to take decisions themselves.

The general powers of the court are to:

- decide whether a person has the capacity to make a particular decision for themselves;
- make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make these decisions;
- appoint a deputy to make ongoing decisions for people lacking capacity to make those decisions;
- decide whether a Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA) is valid;
- remove deputies or attorneys who fail to carry out their duties; and
- hear cases concerning objections to the registration of an LPA or EPA.

In making a decision, the court must apply the statutory principles and the best interests checklist set out in the Mental Capacity Act. In addition, it should make the least restrictive order possible in the circumstances by:

- Making the decision itself in preference to appointing a deputy.
- when appointing a deputy, limiting the extent of their powers and the length of their appointment as far as possible.

The vast majority of applications require the court to exercise its powers under the property and affairs jurisdiction. Very few applications are contested and nearly all are decided on the basis of paper evidence without holding a hearing. In around 95% of cases, the applicant does not need to attend court.

Property and Affairs Applications

From October 2007 to December 2009, the court received 39,579 applications relating to its property and affairs jurisdiction and the vast majority of these were to appoint a deputy to manage the person's property and affairs. The court will generally appoint a deputy when it is necessary to make ongoing decisions on behalf of the person lacking capacity.

The court continues to receive a large number of applications from existing deputies and in particular from receivers appointed under the Mental Health Act who became deputies on 1 October 2007, when the Mental Capacity Act came into force. Applications by existing deputies can cover a wide range of subjects, but usually the application is necessary because the deputy is still acting under the powers of a receiver. Where applications are received from former receivers, the court will usually reappoint them as deputy, so they are on the same footing as someone appointed after 1 October 2007.

Objections to the registration of EPAs and LPAs

The Public Guardian is responsible for registering enduring powers of attorney (EPA) and lasting powers of attorney (LPA), but where there is an objection to registration, the Public Guardian cannot register the instrument until directed to do so by the court.

Figures 5 and 6 in Chapter 6 show a breakdown of EPA and LPA objections received since October 2007.

There are far fewer disputes in relation to LPAs than EPAs, which may reflect that the policy objectives of the Mental Capacity Act have been achieved and are working well. For example, the provision whereby a donor can name up to five "named persons," who are entitled to receive notice of an application to register the LPA, was designed not only to enhance the donor's freedom of choice, but also to prevent ill-founded objections from family members overriding that choice. Similarly, the statutory requirement that the donor's capacity to

execute an LPA must be certified when the power is created ought, inevitably, to reduce the scope for later challenges to the validity of the instrument.

Unlike EPAs, where the principal grounds for objecting to registration has been "that having regard to all the circumstances … the attorney is unsuitable to be the donor's attorney," the equivalent grounds for objecting to the registration of an LPA is "that the attorney proposes to behave in a way that would contravene his authority or would not be in the donor's best interests." This is expressed in the future tense because, until the LPA is registered, the attorney has no authority whatsoever, but it adds to the existing burden of proof the not inconsiderable difficulty of proving future intent. By contrast, there continues to be a significant number of EPA objections, which outnumber LPA objections by a ratio of 6:1.

Lasting Powers of Attorney
The court has the power to determine any question relating to whether the requirements for creating or revoking an LPA have been met and to declare whether "…an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney".

There were criticisms of the two LPA forms prescribed by The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007 No 1253), mainly because of the length (25 pages), but also because of the design. A statutory instrument - The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009 (SI 2009 No 1884) - was laid on 15 July 2009, and came into force on 1 October 2009, which introduces two new prescribed forms of LPA (now down to 12 pages). There is a transitional period until 1 April 2011 during which the forms prescribed by the 2007 Regulations can be used before becoming obsolete.

Where there are questions about the validity of an LPA, the Public Guardian is prevented from registering the instrument, and must apply for the court to determine whether or not the instrument is valid.[2]

The number of applications made by the Public Guardian relating to the validity of an LPA started to increase from October 2008 but declined in the last quarter of 2009 (see figure 5 in Chapter 6). It is too early to say whether this is due to the new prescribed form of lasting power of attorney introduced in October 2009.

Wills, settlements of property and trustees
The Mental Capacity Act restricts some of the decisions that a deputy can make on behalf of the person lacking capacity, including settling property, executing a will and exercising the powers of a trustee. In these instances, the court must make the decision and there are specific practice directions setting out the procedure to follow and evidence required.

Personal Welfare a pplications
Initial estimates were that the court would receive approximately 2,000 applications per year relating to its personal welfare jurisdiction and three quarters would be serious decisions heard at the High Court. It was also thought that the court would appoint approximately 500 personal welfare deputies per year.

The volumes of personal welfare applications have been far fewer than expected. Indeed, in the first six months, the court received only 229 applications.

The Mental Capacity Act and the supporting Code of Practice both emphasise that personal welfare applications should only be made as a last resort. Section 50 of the Act imposes a general requirement for the applicant to seek the permission of the court before making an application and permission is almost always required for personal welfare applications. The intention is to ensure that personal welfare applications are made in the best interests of the person and this is reinforced in the Code of Practice, which provides that "deputies for personal welfare decisions will only be required in the most difficult cases where:

- important and necessary actions cannot be carried out without the court's authority, or
- there is no other way of settling the matter in the best interests of the person who lacks capacity to make

2. Paragraphs 11 (2) and 11(3) of Schedule 1 Mental Capacity Act 2005.

personal welfare decisions."

From the second quarter onwards, the number of applications for personal welfare powers and in particular "hybrid" applications, for an order relating to both personal welfare and property and affairs, increased. From January 2008 to December 2009, the court received 2,695 personal welfare applications but made only 517 orders (see Figure 3 in Chapter 6). Of these, only 195 appointed a deputy for personal welfare. This means that few applications meet the criteria set out in the Code of Practice, and the court is refusing permission in up to 80% of personal welfare applications.

Deprivation of Liberty Safeguards

In April 2009, the Mental Health Act 2007 came into force and added new provisions to the Mental Capacity Act providing a framework for approving the deprivation of liberty of people who lack the capacity to consent to treatment or care in a care home or hospital that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty. The deprivation of liberty safeguards provided for the Court of Protection to hear applications seeking to terminate authorisations, or vary the conditions of an authorisation.

The deprivation of liberty safeguards were supported by new court rules, a practice direction setting out the procedure for making applications and special application forms. The President decided that all applications would be allocated judges in the Family Division of the High Court until the new law had time to bed down.

The uptake in deprivation of liberty applications was lower than anticipated with only 13 applications received in the eight months to December 2009. However, the new laws did result in approximately 300 enquiries about applications and a slight increase in deprivation of liberty applications relating to people not resident in hospitals or care homes.

4. REVIEW OF PERFORMANCE

Performance against targets (Key Performance Indicators)
Until April 2009, the court worked to a set of key performance indicators (KPIs) set by the Office of the Public Guardian (OPG). In April 2009, those KPIs were retained when the court transferred to HMCS and the court continues to monitor performance against these targets. The KPIs and the performance against them are at Appendix E.

The targets for the court to give a direction within 16 or 20 weeks where the case is decided without a hearing include statutory notice periods of up to six weeks for the applicant to serve or notify other people and for those served or notified to respond to the application.

The target to hold a hearing within 6 or 14 weeks of the Judge deciding to hold a hearing was adversely affected by the availability of court rooms in both Archway and at regional courts. The target to hold 75% of hearings within 6 weeks in particular proved to be unrealistic, as the timetable for producing evidence required by the Judges' case management directions often exceeds six weeks anyway. The court intends to review all its targets in 2010.

Complaints
From October 2007 to the end of March 2009, 1,248 complaints were made about the court. The complaints were mostly about delays, the timescales involved in the application process or about judicial directions. From April 2009 to the end of December 2009, there have been 424 complaints which is a significant reduction from the first year. This is largely due to shorter waiting times resulting from the use of visiting judges.

The issues covered by complaints include judicial decisions and unwillingness to comply with rules (25%); the cost of proceedings including fees and security bonds (15%); administrative errors (15%); and the length of the process and delays (30%). The court administration cannot intervene in complaints about judicial decisions which can only be challenged by making an appeal.

Transition cases
The Court of Protection Rules contained a temporary provision enabling receivers appointed under the Mental Health Act 1983 to apply for 'conversion' to a deputy using a simplified application process and without having to pay a fee. This 'free' application procedure lasted from 1 October 2007 until 30 June 2008 and the demand was much higher than forecast.

Although transition did present a challenge to the court, it was recognised that generally it would be in the person's best interests to convert as many cases as possible, so former receivers acting with limited powers would not have to make multiple applications in future. To ensure as many took advantage of the "fee free" window, the court wrote to all former receivers to warn them of the deadline for making applications.

In total the court converted 7,000 receiverships under the transition procedure and by December 2008 all the transition applications had been processed. The court continues to convert receiverships to full deputyships whenever a former receiver makes an application to vary his appointment or request additional authority.

Regional Hearings
As part of the Mental Capacity Act Implementation Programme in 2007, the court set up a protocol with HMCS for regional nominated judges to hear cases at five regional hearing centres. The original protocol was amended following representations from the regional judges, who felt that given the relatively small number of hearings, it would be better if the work could 'follow the judge' and hearings take place at the judge's

resident court or at a court local to the parties.

Although only 6% of cases result in a hearing, the ability to hold hearings close to where the parties live is one of the real success stories of the Mental Capacity Act. A breakdown of regional hearings by year is at Figure 2 in Chapter 6.

Court User Group

The court user group was set up in April 2008 to provide a forum for consultation between the judges and professional and lay court users. The group meets quarterly under the chairmanship of Senior Judge Lush. The terms of reference of the committee are:

The purpose of the Court User Group is to provide a forum for discussion for matters causing concern for Court users and to obtain their views and comments on policy issues.

The group also has a sub committee consisting of practitioners specialising in personal injury litigation, whose terms of reference are:

The purpose of the Damages Case Forum a part of the Court User Group is to provide a forum for discussion for matters causing concern for Court users who specialise in personal injury and clinical negligence cases, to obtain their views and for them to comment on policy issues.

A list of the members of the User Group is at Appendix D.

Transfer to HMCS

In April 2009, responsibility for the court passed from the OPG to HMCS. A small project team was set up to oversee this change with the main aim being the seamless transfer of the court into the RCJ and HMCS structures from 1 April and where possible to adopt HMCS practices and procedures from that date. The project team successfully:

- rebranded all forms, booklets and other publications to reflect the transfer to HMCS; adopting HMCS corporate branding and signage within court public areas;
- transferred all Court of Protection content from the OPG internet site to the HMCS and directgov websites;
- transferred all administrative staff to the Royal Courts of Justice Group under the line management of the RCJ Regional Director and the Probate Area Director;
- adopted HMCS complaint handling procedures; and
- set up a team to handle court fee remissions, previously provided by the OPG as a shared service.

5. Case Law

There have been several reported decisions, or decisions that are likely to be reported, on the jurisdiction of the Court of Protection under the Mental Capacity Act 2005. In chronological order they include:

1. Re GC & Anor [2008] EWHC 3402 (Fam) (Mr Justice Hedley, unreported, 29 July 2008)
GC, aged 82, had lived with his nephew, KS, for 28 years. KS was thought to have schizophrenia. On 7 April 2008 GC's pendant alarm went off accidentally. The police arrived at the house, and discovered that the two men were living in exceptionally squalid conditions. Both of them were admitted to Homerton Hospital. The hospital brought proceedings in the Court of Protection as to whether GC should be returned home on discharge from hospital. There was a disagreement between the two jointly instructed independent experts. The forensic psychiatrist considered that a return home was not in GC's best interests, whereas the social worker, favoured a trial period at home. On the facts, the judge decided that GC ought to be permitted to his home and to continue to share it with KS. Having reviewed sections 1 and 4 of the Act, he said, at paragraphs 14 and 15: "That really provides the statutory framework within which the court approaches this case. It seems to me that when one applies the statutory provisions the impact of them is that the State does not intervene in the private family life of an individual, unless the continuance of that private family life is clearly inconsistent with the welfare of the person, whose best interests the court is required to determine. That is the same principle that governs State intervention under the Children Act 1989, and whilst the Children Act and the Mental Capacity Act deal with quite different problems and must be treated quite separately, in my judgment it is right that the fundamental principle governing the welfare agencies of the State's interventions in private life should be the same. 15. So one turns to the facts of this case for this case, like every other one, is fact specific. It is an almost irresistible temptation to lawyers, schooled in common law tradition, to seek to bring a case within other decided cases. In my view, at least, it is generally a temptation to be resisted. Each human being is unique and, thus, best interests decisions are unique to that human being. In almost every case, it should be enough to test the facts of the case against the relevant statutory provisions in order to ascertain the unique solution to that particular case."

2. Re S and S (Protected Persons), C v V [2009] WTLR 315 (Her Honour Judge Hazel Marshall QC, 25 November 2008)
Judge Marshall considered the weight to be given to P's own wishes and feelings in relation to any application made to the Court of Protection. She held that where P can and does express a wish or a view, which is not irrational, impracticable and irresponsible, then it should carry great weight and give rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of not doing so.

3. Re P [2009] WTLR 651, [2009] EWHC 163 (Ch) (Mr Justice Lewison, 9 February 2009)
In the context of a statutory will application, Mr Justice Lewison considered the difference between substituted judgment and best interests, and held that the earlier law regarding the making of statutory wills, including the landmark decision of Sir Robert Megarry V-C in Re D(J) [1982] 2 All ER 37, is no longer good law because it applied a substituted judgment test.

4. Re J (Enduring Power of Attorney) [2009] WTLR 435, [2009] EWHC 436 (Ch) (Mr Justice Lewison, 12 March 2009)
The judge saw no reason why the Public Guardian should not register an enduring power of attorney in which there was the following successive appointment: "I … appoint my wife [W] to be my Attorney for the purposes [of the] Enduring Powers of Attorney Act 1985 but if she shall have predeceased me or shall be unable to act or to continue to act as my Attorney whether registered or unregistered then in the alternative I appoint my son [A] and my son [B] and my son [C] jointly and severally to be my attorney(s) for the purpose of the Enduring Powers of Attorney Act 1985 with general authority to act on my behalf in relation to all my property and affairs."

5. Re FH, M v Public Guardian [2010] WTLR 51 (Senior Judge Lush, 22 June 2009)
FH executed an enduring power of attorney appointing his son as his attorney. The signatures of both the donor and the attorney were witnessed but, although the witnesses wrote their names and addresses, neither included their signature. The Public Guardian refused to register the instrument because he considered it to be defective. One of the witnesses, M, applied to the court to confirm the validity of the power. It was held that, considering the circumstances, the handwritten names and addresses of the witnesses were deemed to be sufficient proof of identity, even in the absence of signatures. Accordingly the judge directed the Public Guardian to register the instrument.

6. In Re F [2009] WTLR 1309 (Her Honour Judge Hazel Marshall QC, 26 June 2009)
The proper test for the engagement of s 48 in the first instance is whether there is evidence giving good cause for concern that P may lack capacity in some relevant regard. Once that is raised as a serious possibility, the court then moves on to the second stage to decide what action, if any, it is in P's best interests to take before a final determination of his capacity can be made. Such action can include not only taking immediate safeguarding steps (which may be positive or negative) with regard to P's affairs or life decisions, but it can also include giving directions to enable evidence to resolve the issue of capacity to be obtained quickly. Exactly what direction may be appropriate will depend on the individual facts of the case, the circumstances of P, and the momentousness of the urgent decisions in question, balanced against the principle that P's right to autonomy of decision-making for himself is to be restricted as little as is consistent with his best interests. Thus, where capacity itself is in issue, it may well be the case that the only proper direction in the first place should be as to obtaining appropriate specialist evidence to enable that issue to be reliably determined.

7. W Primary Care Trust v TB & Others [2009] EWHC 1737 (Fam) (Mr Justice Roderic Wood, 17 July 2009)
This was an application relating to the Deprivation of Liberty Safeguards (DOLS) introduced into the Mental Capacity Act 2005 by the Mental Health Act 2007. In essence, the evidence established that the care home in which it was proposed to accommodate TB was a registered care home under the Care Standards Act 2000, but was not registered as an independent hospital. Nor was it part of the NHS. Thus it did not fall within the necessary definition of a "Health Service hospital", as defined under the relevant provisions of the MHA 1983. Accordingly the declaration and orders sought by the PCT did not constitute declarations and orders seeking "to accommodate her in a hospital" as defined, and thus TB was not on this basis a "mental health patient" as defined under schedule 1A of the 2005 Act. It followed that her detention in the care home fell outside the categories of ineligibility under paragraph 2 of schedule 1A of the 2005 Act.

8. Re KH, DCC v KH, PJ and others (District Judge O'Regan, Birmingham County Court, 11 September 2009)
This was an emergency application heard by the District Judge in a telephone hearing on 11 September 2009. By an order dated 28 August 2009 provision was made for KH, a young man, to have increasing levels of contact with his mother, PJ. KH had threatened that when he went to see his mother on Monday 14 September, he would not return to his placement. DCC, the local authority, sought an order under the DOLS legislation enabling it to deprive KH of his liberty for the purpose of returning him to his placement, 100 miles away. The application was resisted by the Official Solicitor on behalf of KH. DJ O'Regan held that the application was not necessary because there was already a standard authorisation in place which was sufficiently wide to cover the purposes of the contact visit.

9. In Re M, ITW V Z and others [2009] WTLR 1791, [2009] EWHC 525 (Fam) (Mr Justice Munby, 12 October 2009)
Mr Justice Munby considered a statutory will application in a case in which an elderly woman had been the victim of financial abuse by a neighbour. He held that the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular a priori weight or importance to P's wishes and feelings; it all depends upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P's wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the test of incapacity under the 2005 Act is, as under the common law, 'issue specific', so in a similar way the weight to be attached to P's wishes and feelings will likewise be issue specific. He said that there was no hierarchy of factors in section 4 of the Mental Capacity Act 2005, though there may be a single

factor of "magnetic importance". Like Mr Justice Lewison in Re P, he considered that the previous case law on statutory wills was "best confined to history," and he endorsed the suggestion that a testator would wish to be remembered with affection for having done the right thing.

10. In Re H, Baker v H & another [2009] WTLR 1719 (Her Honour Judge Hazel Marshall QC, 15 October 2009)
This was an application by a professional deputy for the court to reconsider the level of security it required from him (£750,000). Judge Marshall, in reducing security to £175,000 held that the court should take into account the following factors when setting security:

- The value and vulnerability of the assets which are under the control of the deputy.
- How long it might be before a default or loss is discovered.
- The availability and extent of any other remedy or resource available to P in the event of a default or loss.
- P's immediate needs in the event of a default or loss.
- The cost to P of ordering security, and the possibilities and cost of increasing his protection in any other way.
- The gravity of the consequences of loss or default for P, in his circumstances.
- The status, experience and record of the particular deputy.

11. Re LD, KD & another v Havering [2010] WTLR 69 (His Honour Judge Michael Horowitz QC, 19 October 2009)
LD is 21 and has spastic quadriplegia, cerebral palsy, and learning disabilities. His mother and primary carer, KD, has mental health problems of her own. In January 2009 the London Borough of Havering applied to the Court of Protection for an order regarding his residential placement, an order to replace the mother as his deputy for property and affairs, and an order that the council be appointed as his personal welfare deputy. On 9 April 2009 a District Judge dealt with the matter summarily at an attended hearing, and allowed the local authority's application in its entirety. On allowing an appeal by both KD and LD, Judge Horowitz considered the effect of rule 27 of the Court of Protection Rules 2007 ("Exercise of powers on the court's own initiative"), and concluded that the District Judge had "achieved an impermissible hybrid, in the course of a hearing exercising powers potentially available to the court instead of a hearing," and that there was a breach of procedural fairness and of Article 6 of the ECHR.

12. Independent News and Media Ltd & Others v A [2010] WTLR 55, [2009] EWHC 2858 (Fam), (Mr Justice Hedley, 12 November 2009)
This involved an application by the Independent Newspaper to attend Court of Protection proceedings relating to a disabled but very talented young man, about whom they and other newspapers had already published a number of articles. The judge concluded that the media should be allowed to attend these proceedings, and should be allowed to report two types of material, namely (1) that which is within the public domain already, and (2) that which answers the legitimate questions of a reasonable person who knows what is presently within the public domain. The Official Solicitor has appealed this decision.

13. Re GJ [2009] EWHC 2972 (Fam) (Mr Justice Charles, 20 November 2009)
This was described by the judge as a "borderline case" (para. 126). The facts appear from paragraph 104 onwards. GJ is a man aged 65. He has a diagnosis of vascular dementia, Korsakoff's syndrome, and amnesic disease due to alcohol. He also suffers from diabetes and is prone to hypoglycaemic attacks. A standard authorisation for DOLS was made on 13 August 2009, and renewed on 12 September 2009. In the meantime an application had been made to the Court of Protection. The judge held that GJ could not be detained under the DOLS authorisation for the treatment of his mental disorder, but he could be so as to receive care and treatment for his physical disorder (diabetes). As such, he was eligible to be deprived of his liberty.

14. Re Mark Reeves (Senior Judge Lush, 5 January 2010)
Mark Reeves was injured in a road traffic accident in October 1985 shortly before his eighteenth birthday. There was a trial on quantum before His Honour Judge Oliver-Jones QC in April 2003, but the damages awarded (£2,529,630) failed to beat the defendant's payment into court, and the claimant had to pay the costs of the trial. He currently resides at the Transitional Rehabilitation Centre (TRU) in Merseyside, and his deputy applied to St Helen's Council for assistance in funding his care. The Council compelled the deputy to make an application to the Court of Protection for authorisation to apply for public funding, and was relying on a

recent decision of the Court of Appeal in Peters v East Midlands Strategic Health Authority [2009] EWCA Civ 145, in which Lord Justice Dyson had accepted a deputy's undertaking to apply to the Court of Protection as "an effective way of dealing with the risk of double recovery". The Senior Judge held that the application was misconceived in seeking to apply the recent decision in Peters to a case that had been determined six years previously, and also intimated that, despite the dicta of Lord Justice Dyson, the Court of Protection is not really an appropriate forum to adjudicate on matters relating to double recovery in personal injury proceedings.

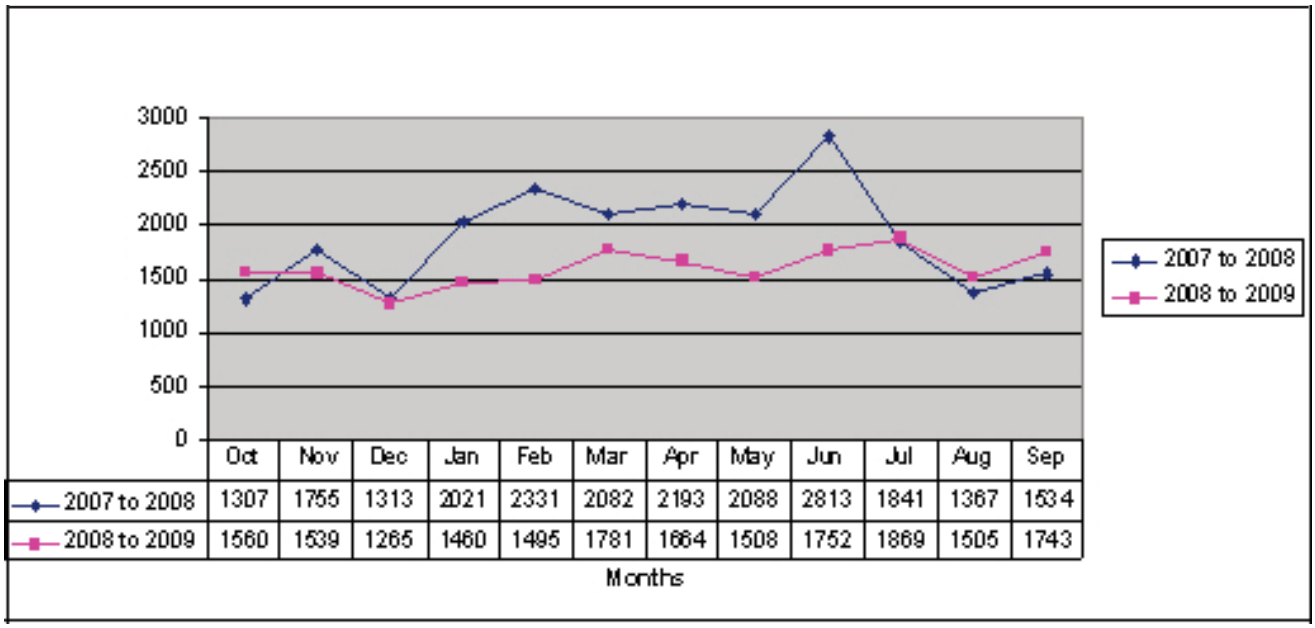
15. London Borough of Enfield v SA, FA, and KA [2010] EWHC 196 (Admin) (Mr Justice McFarlane, 9 February 2010)

This case considers at length whether hearsay evidence is admissible in the Court of Protection. SA was born in 1979, and is one of seven children. She and her family came to the UK from Bangladesh in 1985. She has leukodystrophy, a degenerative brain disorder. The local authority applied to the Court of Protection on 29 April 2009 for a personal welfare order that would have removed her from the family home, where she is allegedly the victim of physical abuse, and her will is overborne by her parents. It would also prevent her removal from the UK for the purpose of marriage in Bangladesh. The judge held (at paragraph 36) that rule 95(d) of the Court of Protection Rules 2007 gives the court power to admit hearsay evidence which would otherwise be inadmissible under the Civil Evidence Act 1995, section 5. The judgment is largely a preliminary fact-finding exercise, and the judge did not find that any of the allegations of physical assault made by the local authority against the parents had been proved (paragraph 98). However, he did find that the general allegation of parental failure to co-operate with the local authority, and allegations about making arrangements to have SA married were proved.

6. VOLUME OF BUSINESS

Applications received

Figure 1 shows the volume of applications received from October 2007 to September 2009. The volumes increased significantly from January 2009 as former receivers lodged applications before the fee free provisions for deputies came to an end in June 2008. Since the end of the transition period, the court has received around 1600 applications per month.

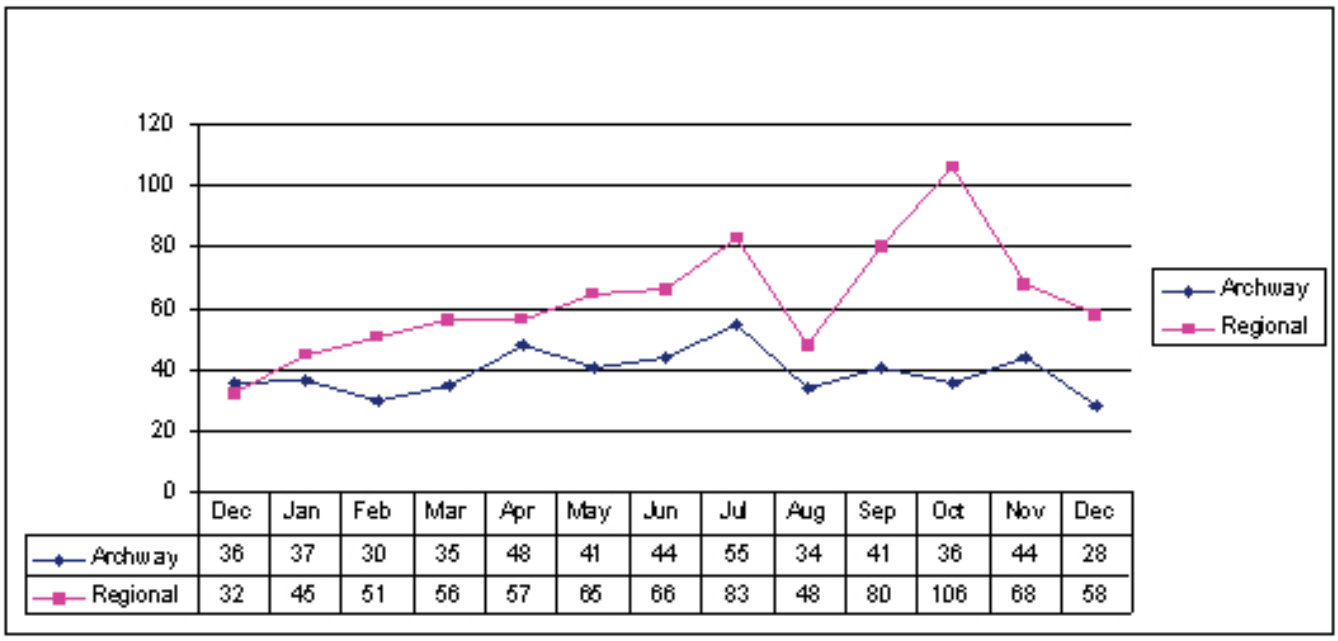


	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
2007 to 2008	1307	1755	1313	2021	2331	2082	2193	2088	2813	1841	1367	1534
2008 to 2009	1560	1539	1265	1460	1495	1781	1664	1508	1752	1869	1505	1743

Figure 1: Applications received

Hearings

Figure 2 shows how hearings were divided between Archway and the regional courts. The number of cases listed for hearing in regional courts continued to increase throughout 2008 and 2009 to the extent that almost half of all hearings listed in 2009 were outside London



	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Archway	36	37	30	35	48	41	44	55	34	41	36	44	28
Regional	32	45	51	56	57	65	66	83	48	80	106	68	58

Figure 2: Hearings Dec 2008 to Dec 2009

Applications by type

Figures 3 and 4 show the volumes of applications received and orders made, by type from October 2007 to December 2009 (excluding enduring and lasting powers of attorney). The volume of property and affairs applications has remained fairly constant with the increase in business during the first three quarters of 2008 due to applications under the transition provisions.

The number of personal welfare applications increased steadily until they bottomed out at around 120 applications per month. The discrepancy between personal welfare applications received, and orders made, is because in most cases, the applicant was refused permission to apply. This is discussed in more detail in Chapter 3.

	Oct to Dec 2007	Jan to Mar 2008	Apr to Jun 2008	Jul to Sep 2008	Oct to Dec 2008	Jan to Mar 2008	Apr to Jun 2009	Jul to Sep 2009	Oct to Dec 2009
Property & Affairs applications	3814	5396	4781	5396	3124	4015	4052	4562	4439
Property & Affairs orders issued	2153	4244	2788	4493	3744	2388	3510	3969	3774
Health & Welfare applications	39	150	373	411	230	345	376	443	367
Health & Welfare orders issued	2	26	22	64	28	31	56	49	46
Property & Affairs deputy appointments	170	1367	1468	2974	2346	1992	2805	1957	3228
Health & Welfare deputy appointments	0	6	11	45	21	21	33	28	30

Figure 3: Quarterly breakdown of applications received and orders made (1)

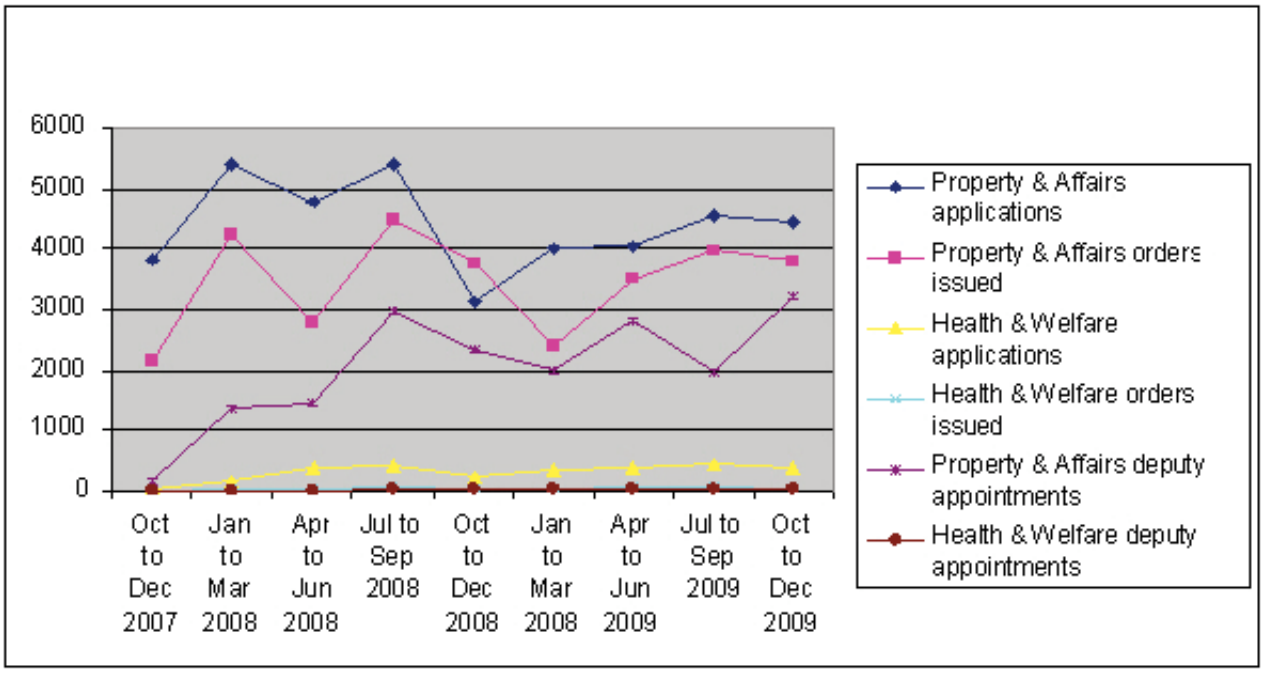


Figure 4: Quarterly breakdown of applications received and orders made (2)

Enduring power of attorney and lasting power of attorney applications
Figure 5 shows the numbers of applications made objecting to the registration of an enduring power of attorney (EPA) or a lasting power of attorney (LPA).

The 278 applications recorded in the first quarter were mostly residual applications received before October 2007 in the Public Guardianship Office. The OPG became the registering authority in October 2007 and had no authority to deal with pending objections. Over the first three months the OPG reviewed the EPA caseload and handed over any outstanding objections to the court.

Figure 5 also shows applications by the Public Guardian relating to LPAs that contain ineffective provisions, where the Public Guardian is prevented from registering the instrument, and must apply for the court to determine whether or not the instrument is valid. In the first year the court received only 12 applications from the Public Guardian and in the last quarter, the numbers declined. Whether this is due to the new prescribed form of lasting power of attorney introduced in October 2009, it is too early to say.

	Oct to Dec 2007	Jan to Mar 2008	Apr to Jun 2008	Jul to Sep 2008	Oct to Dec 2008	Jan to Mar 2008	Apr to Jun 2009	Jul to Sep 2009	Oct to Dec 2009
EPA Objections	278	113	173	137	122	116	101	48	93
LPA Objections	5	5	6	14	23	26	21	5	14
LPA Validity applications made by the Public Guardian	2	2	4	4	59	60	66	47	40

Figure 5: EPA and LPA applications

Figure 6 shows how EPA objections outnumber LPA objections by a ratio of up to 6:1, whereas the OPG receives more than three times more applications to register an LPA than an EPA. As suggested in Chapter 3 this indicates that the policy objectives of the Mental Capacity Act have been met.

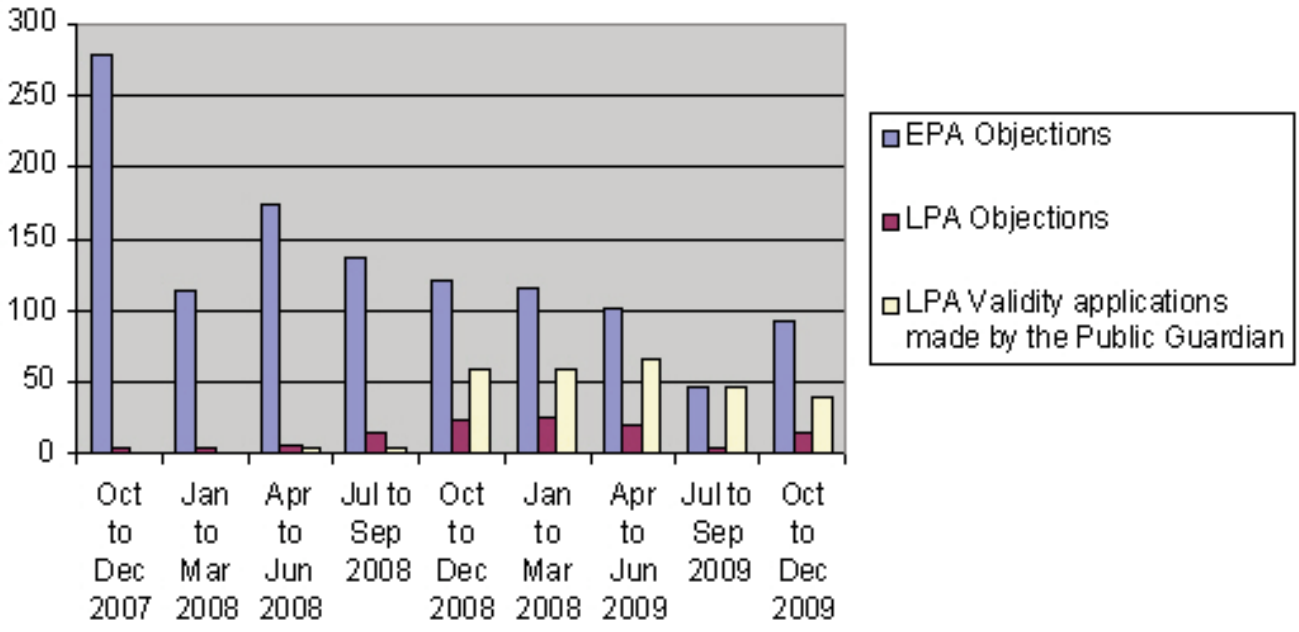


Figure 6: Comparison of EPA and LPA applications

Appendix A: Court Leadership

President of the Court of Protection	Sir Mark Potter
Vice President of the Court of Protection	Sir Andrew Morritt
All Judges of the Family and Chancery Divisions of the High Court	
Senior Judge	His Honour Judge Denzil Lush
Regional Director	David Thompson
Area Director	Helen Smith
Court Manager	Gabrielle Bradshaw
Deputy Court Manager and Head of Performance and Specialist Court Group	James Batey
Deputy Court Manager and Head of Listing and Appeals Branch	Ross Hamilton
Deputy Court Manager and Head of Applications Branch	Fred Prempeh

Appendix B: Court of Protection Judiciary

Full time Judges

	Period of secondment
Senior Judge Denzil Lush	October 2007 (permanent)
District Judge Stephen E Rogers	October 2007 to September 2010
District Judge Marc Marin[3]	October 2007 to present
District Judge Susan Jackson	October 2007 to August 2009
District Judge Keeley Bishop	October 2007 to October 2009
District Judge Alex Ralton	April 2009 to March 2011

Nominated District Judges

	Resident court
District Judge Michael Payne	Oxford Combined Court Centre
District Judge Patrick Bazley-White	Ipswich County Court
District Judge Alan Thomas	Gloucester County Court,
District Judge R D I Adam	Swindon Combined Court,
District Judge John Freeman	Weymouth & Dorchester Combined Court,
District Judge Michael Anson	Preston Combined Court Centre
District Judge Debbi O'Regan	Birmingham County Court,
District Judge Tony Davies	Birmingham County Court
District Judge David Millard	Nottingham Combined Court Centre,
District Judge I R Knifton	Birkenhead County Court
District Judge David Owen	Birmingham County Court
District Judge J E Mainwaring-Taylor	Teeside Combined Court Centre
District Judge Gordon Lingard	Bradford Combined Court Centre
District Judge Margaret Glentworth	Leeds Combined Court Centre
District Judge Nicholas Goudie	Newcastle Combined Court Centre
District Judge Gordon Ashton	Preston Combined Court Centre
District Judge Charles Khan	Manchester County Court
District Judge John Coffey	Liverpool Civil & family Court
District Judge Anthony Harrison	Manchester County Court
District Judge Charles Dawson	Cardiff Civil Justice Centre
District Judge Penny Cushing	Principal Registry of the Family Division
District Judge Richard Harper	Principal Registry of the Family
District Judge Susannah Walker	Principal Registry of the Family
Senior District Judge Philip Waller	Principal Registry of the Family
District Judge Owen Williams	Caernarfon Court

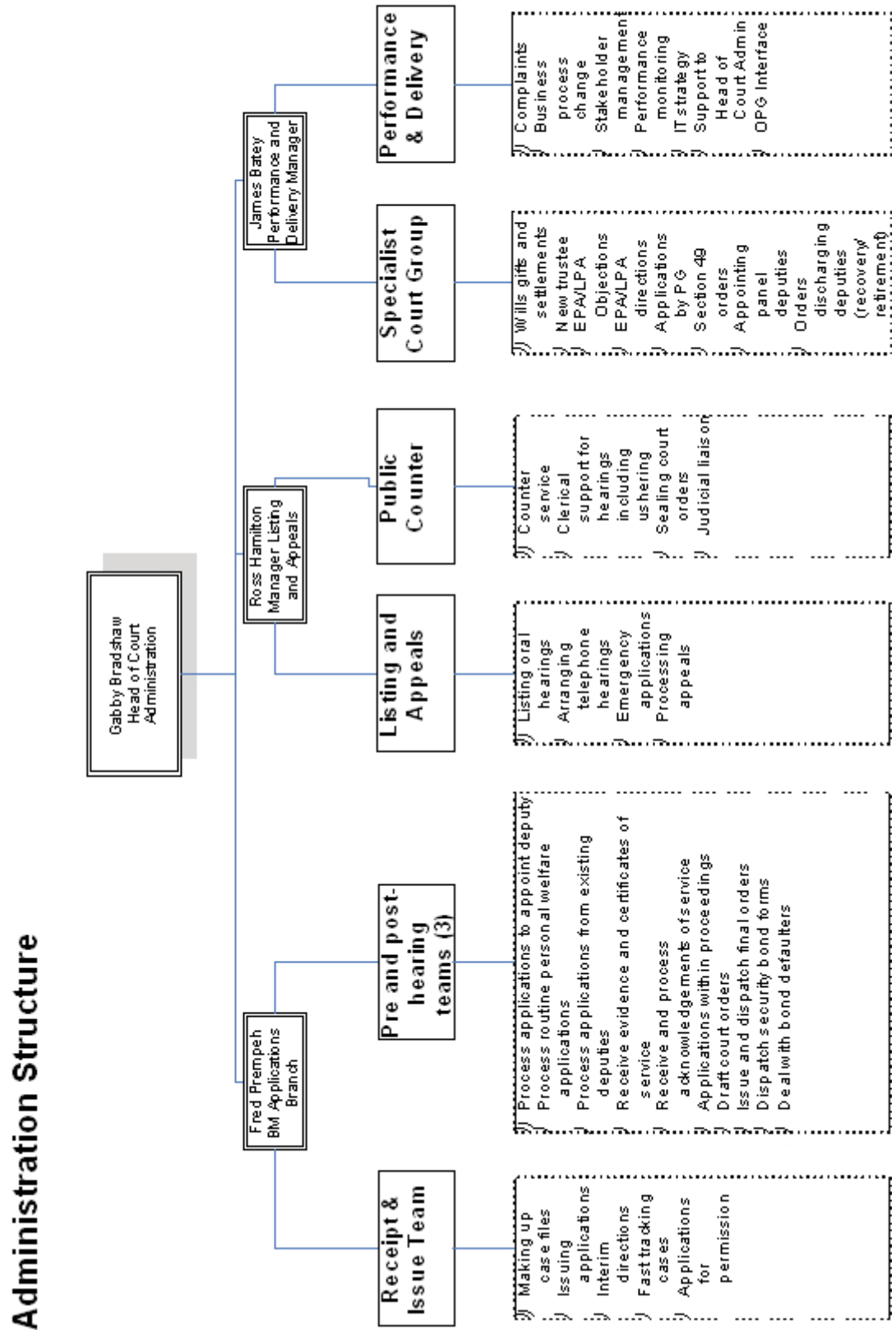
Nominated Circuit Judges

	Circuit
His Honour Judge Allweis	Northern
His Honour Judge Paul Barclay	Western
His Honour Judge Behrens	North Eastern
His Honour Judge Cardinal	Midland
Her Honour Judge Darwall-Smith	Western Circuit
His Honour Judge Iain Hamilton	Northern
His Honour Judge Hodge QC	Courts of Justice
His Honour Judge Kaye TD, QC	North Eastern

3. District Judge Marin is included as part of the full time Court of Protection Judiciary although he sits only one week in five. He sits at Barnet Civil and Family Courts Centre for the remaining weeks.

	Circuit
Her Honour Judge Marshall QC	South East
Her Honour Judge Moir	North Eastern
His Honour Judge Pelling, QC	Northern
His Honour Judge Phillip Price, QC	Wales
His Honour Judge Charles Purle QC	Midland
His Honour Judge John Altman (DFJ)	South East
His Honour Judge Michael Horowitz QC	South East
His Honour Judge Rodger Hayward Smith	South East
His Honour Judge David Turner QC	South East

APPENDIX C: COURT STRUCTURE



Appendix D: Court User Group Members

Member	*Organisation*
John Ripley	Hampshire County Council
Tony Spiers	Withy King Solicitors
Peter Marquand	Capsticks Solicitors
David Rees	Barrister
Eddie Fardell	Thomson Snell & Passmore Solicitors
Caroline Bielanska	Solicitors for the Elderly
Fiona MacGillivray	Family Action
Martin Terrell	Thomson Snell & Passmore Solicitors
Andrew Harding	Hugh James Solicitors
Michael White	London Borough of Hammersmith &Fulham
Clive Lissaman	HSBC Insurance Ltd
Stephen Ashcroft	Frenkel Topping
Paul Greatorex	Barrister
Niall Baker	Irwin Mitchell Solicitors
Paul McNeill	Field Fisher Waterhouse Solicitors
Chris Bunting	Burroughs Day Solicitors
Helen Starkie	Moore Blatch Solicitors (representing Law Society)
Hugh Jones	Pannone & Partners Solicitors
Janet Ilett	Official Solicitor
Beverley Taylor	Official Solicitor
Elizabeth Jeary	Court Funds Office
Paul Gantley	Department of Health
Colin Baker	Senior Courts Costs office

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Appendix E: Court Key Performance Indicators

- KPI 1: In 95 per cent of cases we will contact the applicant within 20 working days of receipt of the formal application
- KPI 2: In 75 per cent of applications where no oral hearing is directed, the court will give a direction within 16 weeks; and in 98 per cent of applications the court will give a direction within 20 weeks
- KPI 3: In 75 per cent of applications where an oral hearing is directed, the hearing will be arranged within 6 weeks of the direction, with all hearings being arranged within 14 weeks.
- KPI 4: We will respond to 95% of correspondence (including letters, faxes and emails) within 10 working days of receipt.

Performance 1 October 2007 to 31 March 2008

KPI	Target	Achieved to 31 March 2008
Applications		
% of cases where we contacted the applicant within 20 working days of receipt	95%	85%
Cases decided without a hearing		
% of applications, where no oral hearing is directed, the court to give a direction within 16 weeks	75%	92%
% of applications, where no oral hearing is directed, the court to give a direction within 20 weeks	98%	96%
Cases decided with a hearing		
% of applications, where an oral hearing is directed, hearing to be arranged within 6 weeks	75%	71%
% of applications, where an oral hearing is directed, hearing to be arranged within 14 weeks	100%	94%
Correspondence		
% of correspondence (including letters, faxes and emails) responded to within 10 working days of receipt.	95%	85%

Performance 1 April 2008 31 March 2009

KPI	Target	Achieved to 31 March 2009
Applications		
% of cases where we contacted the applicant within 20 working days of receipt	95%	84%
Cases decided without a hearing		
% of applications, where no oral hearing is directed, the court to give a direction within 16 weeks	75%	77%
% of applications, where no oral hearing is directed, the court to give a direction within 20 weeks	98%	85%
Cases decided with a hearing		
% of applications, where an oral hearing is directed, hearing to be arranged within 6 weeks	75%	47%
% of applications, where an oral hearing is directed, hearing to be arranged within 14 weeks	100%	91%
Correspondence		
% of correspondence (including letters, faxes and emails) responded to within 10 working days of receipt.	95%	93%

Performance 1 April 2009 to 31 December 2009

KPI	Target	Achieved to 31 December 2009
Applications		
% of cases where we contacted the applicant within 20 working days of receipt	95%	92%
Cases decided without a hearing		
% of applications, where no oral hearing is directed, the court to give a direction within 16 weeks	75%	77%
% of applications, where no oral hearing is directed, the court to give a direction within 20 weeks	98%	84%
Cases decided with a hearing		
% of applications, where an oral hearing is directed, hearing to be arranged within 6 weeks	75%	59%
% of applications, where an oral hearing is directed, hearing to be arranged within 14 weeks	100%	97%
Correspondence		
% of correspondence (including letters, faxes and emails) responded to within 10 working days of receipt.	95%	75%

Chapter Heading